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Dean Hales and Valda Hales v. Vance Peterson and Margery Peterson, dba Valley Builders Supply Company and Paul Caldwell : Brief of Respondents

Utah Supreme Court

Don J. Hanson; Dilworth Woolley; Attorneys for Defendants-Respondents;

IN THE SUPREME COURT
of the
STATE OF UTAH

DEAN HALES and VALDA HALES,
Plaintiffs and Appellants,
vs.
VANCE PETERSON and MARGERY PETERSON, d.b.a. Valley Builders Supply Company, and PAUL CALDWELL,
Defendants and Respondents.

Case No. 9294

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This action was brought by the plaintiffs to recover for the alleged wrongful death of their minor child, Nila Hales, who was struck by a truck operated by the defendants on October 24, 1958 in Redmond, Utah (R. 1-3). The case was tried before the Honorable John L. Sevy, Jr., sitting with a jury, at Richfield, Sevier County, State of Utah commencing on the 7th day of March 1960 (R. 142). At the conclusion of the evidence the case was submitted to the jury (R. 366), who returned a verdict of "no cause of action" in favor of the defendants and against the plaintiffs.

Plaintiffs filed a Motion For New Trial upon various grounds which included that the trial court erred in the instructions given to the jury and erred in that it failed to give other instructions; that the trial court refused to admit evidence of certain tests which the plaintiffs had made; that defense counsel was guilty of misconduct; and that the verdict was contrary to the weight of the evidence. The questions to be decided in a general way then are: Whether or not the evidence was so favorable to the plaintiffs as to compel a finding by the jury that they were entitled to recover; whether or not the trial court should have permitted the evidence of tests made by the plaintiffs to be admitted; whether the trial court erred in the instructions which it gave or refused to give to the jury; and whether or not plaintiffs received a fair and impartial hearing.

The facts of the case are as follows:

STATEMENT OF FACTS

The accident occurred in front of an elementary school in Redmond, Utah (R. 7-8). The general area is illustrated by a diagram (Exhibit 9) and a series of pictures (Exhibits 8, 11 and A). The elementary school building is located on the north side of a street which extends in an east-west direction. The front of the school building is located a distance of

58.5 feet from the north side of the aforementioned street. There are a slide, teeters and swings located in a playground area southeast of the school building. The slide, which is the piece of playground equipment closest to the north side of the street, is 17 feet north of the curb line of the street. The school building is approximately 108 feet from a street which borders the school grounds on the west extending north-south. The area between the school building and this street is clear or open. The school grounds are not enclosed with a fence or anything of that nature (R. 249).

There was a gravel walk on the north side of the street extending east-west and a cement walk on the south side of this street (R. 229).

According to the diagram (Exhibit 9) the street in front of the school was 48.3 feet wide from curb to curb. According to one of the investigating officers, State Highway Patrolman Bud G. Larson, the street is 49 feet 6 inches from curb to curb (R. 229). The street is hard surfaced although the record does not disclose whether this is asphalt, oil or pavement (see Exhibits 8, 11 and A).

The sidewalk on the south side of the street is 8.5 feet wide.

Starting at the intersection of this street with the north-south street west of the school, there are

no buildings on the south side of the street until we reach a point 108 feet east of the intersection. At this point there is a small building 26 feet wide which is the Post Office. There is then a vacant lot 49 feet wide. Adjacent to this is an abandoned building referred to as the "opera house" in the record. Between this building and the next building in which are located some stores there is an alley 11.5 feet wide which is shown in plaintiffs' Exhibit No. 11. In the building designated as "stores" there were two establishments, a sewing shop operated by Mrs. Carl Anderson on the west side and a grocery store operated by Mrs. Mathel Mickelson and her husband on the east side (R. 328-329). Continuing east there was another alley 14 feet wide and then a building 19 feet wide housing a billiard hall.

There was a stop sign located on the southwest corner of the intersection of the streets bordering the school on the south and on the west. There was no painted cross walk anywhere on the street extending east-west; nor was there any painted line down the center of the road (R. 234). The road in front of the school is slightly down-grade to the east (R. 284).

At the time of this accident there were five cars parked parallel with the south curb of the street in front of the school (R. 294, 314). Three of these cars have been identified as Mrs. Fair-

bourne's truck, the principal's car and the Hales car (R. 174). The Fairbourne car is marked "F" on the diagram; the principal's car is marked "P" on the diagram and the Hales car is marked "H" on the diagram.

The principal of the elementary school was Roger E. Nielsen (R. 236). He owned the car designated as the principal's car, which was parked slightly to the west of the alley on the east side of the abandoned building designated as the "opera house" (R. 238). The position of his vehicle relative to the alley is illustrated by plaintiffs' Exhibit No. 11. Mrs. Hales' car was parked directly to the west or behind the principal's car (R. 239). The principal's car was a 1946 Chevrolet pick-up with a rack for cattle on the back of the truck. Part of the rack is visible in Exhibit No. 11. The Hales vehicle was approximately two feet behind the principal's vehicle and they were both about six to eight inches from the curb (R. 296).

The defendant Paul Caldwell, the driver of the defendant's vehicle (R. 279), testified that on the morning of the accident he had been up to a gravel plant in Redmond, Utah (R. 280-281). He was driving the truck which is pictured in plaintiffs' Exhibits 8 and 10, which truck had dual wheels on the rear (R. 281). It has a metal bed with wood sides approximately 4 feet high. The bed extends

about 1 foot on each side of the cab of the truck (R. 282).

Mr. Caldwell drove his truck from the gravel plant to the intersection formed by the streets bordering the school on the west and the south sides. He stopped his truck for the stop sign at this intersection (R. 283). He then continued on east on the street on the south side of the school grounds. As he was driving down this street he noted five automobiles parked parallel on the south side of the street (R. 295) and children over by the school grounds playing ball. He had accelerated to a speed between 15 and 20 miles per hour (R. 285) when he felt a "bump" on the right rear duals, indicating that they had passed over some object (R. 286). He brought his vehicle to a stop within a distance of 35 feet and upon getting out of the truck saw the minor child lying in the road approximately 35 feet west of the truck (R. 341).

Mr. Caldwell has drawn a blue line on Exhibit No. 9 indicating the road traveled by his vehicle before and after the accident. The spot where the child was lying is indicated by the dark area identified as a blood spot on Exhibit 11 (R. 289).

Valda Hales, the mother of the minor child, Nila Hales, was employed as a teacher at the elementary school which Nila was attending, Nila being in the fourth grade (R. 173). They left home the

morning of the accident a little before 8:30 o'clock and arrived at the school grounds a few minutes later, where Mrs. Hales parked her automobile behind Mr. Nielsen's truck. The child had some eggs and pop bottles which she was to take to the grocery store. After they arrived across from the school Nila went to the store and her mother went across the street to the school building (R. 175). This was the last Mrs. Hales saw of her child until after the accident.

Mrs. Mathel Mickelson, who was running the store across from the school grounds in the building designated "stores" in the diagram (R. 228), observed the child come into the store a little before a quarter to nine o'clock with a pan of eggs (R. 329). The child then left the store and came back with some bottles, stating that her mother had sent them in and that her mother would be back at noon to get a few things (R. 330). She had a quarter and bought five licorices and then left the store (R. 330). The witness had taken the eggs and started over to the egg case and had taken seven or eight steps when she felt with her feet a "thud" on the floor (R. 330). She ran out into the street where she observed the child and then ran back into the store and told her husband to call for help. As she did so she saw Mr. Nielsen, Mrs. Fairbourne and Mrs. Hales come out of the school building (R. 332).

There were two children who claimed to have seen the accident. The first of these is David Weldon, a child 8½ years of age (R. 261) whose testimony is set out in the plaintiffs' brief. That he was confused is obvious from a reading of his testimony and the fact that his testimony is not consistent with the physical evidence found by the officers whose testimony will appear later. At the outset, when being questioned by plaintiffs' attorney, he testified that the last time he saw the deceased on the morning of the accident was when she was over by the swings and that he did not see her come to school the morning of the accident (R. 262-263). Upon being asked if he saw Nila when she was over by the cars (R. 264) David then testified that she was over there by the alley the last time he saw her (R. 265). Upon being asked where she went when she was over by the alley, he testified, "I think she put some groceries in this car" (R. 265). He then went on to state that the deceased, Nila, got in the back of her car and then walked out into the street to the middle of the road (R. 267) where she stopped and stood and yelled, "Help, help" (R. 268). The child concluded by stating that he was not positive as to what happened but that he was trying to tell how he thought the accident happened.

The eye witness account which it will be seen

was consistent with the physical evidence in the case was that of Gerald Christensen, a boy 13 years of age (R. 312). He testified that he was on the school grounds playing kick-ball when he saw the deceased and her mother drive up (R. 313). He saw Nila go into the store and stay in there for a few minutes and then come back out and put some things in the car (R. 313), which was on the side of the street across from the school house. She then came around between the front of the Hales car and the back of the principal's car and, in the words of the witness, "darted out" into the street (R. 314). The truck at that point evidently passed between the witness and the deceased as he just caught a glance of her between the cab and the rack of the defendants' truck. It was his impression that she was struck by the rack of the truck (R. 316). On cross examination he stated that "it looked like the rack had hit her and the wheels had caught her someway and flipped her".

The first investigating officer to arrive at the scene of the accident was Carl Anderson, who at the time of this accident was the city marshal of Redmond City (R. 338). He was told of the accident by his wife at approximately 20 or 15 minutes to 9:00 and went immediately to the scene where he found Mrs. Hales kneeling beside the body, Bessie Poulson, Mrs. Mickelson and the truck driver, Paul

Caldwell. He first called an ambulance and then interviewed Mr. Caldwell, who told him that he did not see the child (R. 341). He observed three cars parked in the immediate vicinity, which have been previously identified as the principal's car, Mrs. Hales' car and the Fairbourne car. He measured the distance from the body to the defendants' truck. He found the truck to be 35 feet to the east of the body. He then authorized the defendant Paul Caldwell to move his truck so that other traffic might pass up and down the street. When the other officers from the Sheriff's office and the highway patrol arrived, the witness, Carl Anderson, and they made an inspection of the truck for any indication as to what part of the truck had hit the child. The only marks that they could find on the truck was some blood between the duals on the right rear of the truck. He took no other measurements at the scene but did observe tread marks leading from the body of the deceased and a small blood spot at approximately the distance of one turn of the wheel from the body of the deceased.

Another officer who investigated the accident was Murvin L. Colby, Chief Deputy Sheriff of Sevier County (R. 193), who arrived at the scene shortly after 9:00 o'clock A.M. At the time he arrived Highway Patrolman Bud Larsen and Carl Anderson, City Marshal of Redmond, and a number

of the town people were around. The deceased had been taken from the scene of the accident. He took the pictures Exhibits 8, 10 and 11 and defendants' Exhibit A. Plaintiffs' Exhibits 8 and 11 show the large blood spot which he found on the highway (R. 195-197). Exhibit 11 also shows the alley between the opera building and the stores previously referred to and principal Nielsen's truck which was parked immediately to the west of the alley. Exhibit 10 is a picture of the defendants' truck (R. 196) and Defendants' Exhibit A shows the approximate location of the blood spots with reference to the sides of the street. The officer in that picture is standing in the area marked by the blood. He was also present at the interview with the defendant driver, Paul Caldwell, who stated that he was coming down the road and felt a "bump". Knowing that no "bump" should be there, he knew he must have run over something. He stopped his truck and got out and saw the child lying on the street. He stated that at the time he thought he was going around 15, but not exceeding 20 miles per hour; that he had stopped at a stop sign just half a block prior to that (R. 199). He also participated in the inspection of the defendants' truck for any indication as to what part of the truck had struck the child and found no marks on the entire truck with the exception of a blood stain on the outside of the inside dual of the right rear wheel (R. 205).

Highway Patrolman Bud Larson was the officer who made the measurements at the scene of the accident. His testimony is illustrated by the green pencil marks on the diagram, plaintiffs' Exhibit 9 (R. 217). There was a blood spot on the road approximately 2 feet in diameter (R. 223). It was 18 feet 5 inches from the south side of the road to the center of the blood spot (R. 223) and 31 feet from that spot to the north curb (R. 230). There was a small second blood spot approximately one roll of a truck tire from the first (R. 223). The street was 49 feet 6 inches wide from curb to curb (R. 229) He observed the pickup truck with the high rack on it on the south side of the street immediately west of the alley (R. 226) and the second vehicle (the Hales' vehicle) immediately behind it (R. 227). He also participated in the inspection of the defendants' vehicle and found no marks on the vehicle except on the rear dual wheels (R. 230) He testified that he did not see any scuff marks or debris on the highway indicating the course of the truck from the child's body to any point east of there (R. 224) and that there was no marked cross walk in the area (R. 234). He said the posted speed limit in the area was 20 miles per hour (R. 232).

The school principal, Roger E. Nielsen, who had previously testified as a witness for the plaintiffs, took the stand near the end of the plaintiffs'

case to testify to a test which he had conducted. He testified that he took seven girls and asked them first to walk 100 feet at the normal pace they would walk coming to school, then to go back and walk as fast as they could without running, and the third time to run that distance at as fast a speed as they could run. He then proposed to testify as to the individual times that each of these individual girls walked leisurely, fast or ran 100 feet. His proposed answer was objected to on the ground that there was no evidence that this child walked or ran into the street, upon the further ground that any statistical analysis of anything based on seven people would not be a reliable statistical analysis, upon the further ground that the speed at which children walk or run is something that is within the experience of ordinary human beings and not something on which the jury needs expert testimony, and that the testimony was therefore incompetent, irrelevant and immaterial (R. 299, 300, 301). The court excluded the testimony and the plaintiffs in the absence of the jury explained to the court that assuming that the child's body was lying 18 feet 5 inches from the curb, and assuming that the child's body had been passed over by one or more of the right wheels of the truck, and assuming that the truck was traveling at a speed of approximately 15 to 20 miles per hour and generally parallel to the road, and assuming that

there was a truck 82 inches wide parked within 6 inches of the south curb and a touring car directly behind the truck parked within 6 inches of the south curb with a width of 70 inches, and assuming the child was walking at a speed of the average of these girls, they proposed to show the minimum distance the truck traveled between the time that the child left the north side of the parked cars and the time she was struck by the truck by the testimony of a Dr. Gardner (R. 303). Plaintiffs did not proffer the testimony shown on page 15 of their Brief and there is no evidence to that effect in the record. The court refused to allow the evidence on the theory that it was incompetent and too speculative and that there was no sufficient hypothesis or grounds on which to base the hypothetical question (R. 309).

After being instructed by the court, whose instructions we shall duscuss later, the case was submitted to the jury who returned a verdict of "no cause of action" in favor of the defendants and against the plaintiffs (R. 369). The plaintiffs filed a Motion For Judgment Notwithstanding The Verdict and a Motion For New Trial (R. 134, 135, 136), which were denied by the court (R. 137).

The plaintiffs complain of the action of the court in a number of respects which we shall define and discuss as outlined in the following statement of points.

STATEMENT OF POINTS

POINT I.

THE COURT DID NOT ERR IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT DESPITE PLAINTIFFS' CONTENTION THAT THE OVERWHELMING EVIDENCE SUPPORTED A DIRECTED VERDICT FOR THE PLAINTIFFS.

POINT II.

THE TRIAL COURT DID NOT ERR IN REFUSING THE PLAINTIFFS' EVIDENCE RELATING TO THE LENGTH OF TIME IT TOOK THE GIRLS OF THE SAME AGE AS DECEASED TO WALK OR RUN A DISTANCE OF 100 FEET.

POINT III.

THE COURT DID NOT ERR IN REFUSING PLAINTIFFS' REQUESTED INSTRUCTION NO. 14 TO THE EFFECT THAT NILA HALES EXERCISED ORDINARY AND REASONABLE CARE FOR HER OWN SAFETY.

POINT IV.

THE COURT DID NOT ERR IN THE INSTRUCTIONS GIVEN BY THE COURT ON NEGLIGENCE, PROXIMATE CAUSE, CONTRIBUTORY NEGLIGENCE AND UNAVOIDABLE ACCIDENT.

POINT V.

PLAINTIFFS RECEIVED A FAIR AND IMPARTIAL HEARING AND WERE NOT PREJUDICED BY ANY MISCONDUCT OF DEFENDANTS' COUNSEL OR INSTRUCTIONS WHICH WERE GIVEN OR WERE NOT GIVEN BY THE TRIAL COURT.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL OR JUDGMENT NOTWITHSTANDING THE VERDICT DESPITE

PLAINTIFFS' CONTENTION THAT THE OVERWHELMING EVIDENCE SUPPORTED A DIRECTED VERDICT FOR THE PLAINTIFFS.

The plaintiffs cite a number of cases and authorities in their Brief to the effect that a greater degree of care is owed by a motorist to children than would be owed to adults under the same or similar circumstances, and with this we have no quarrel. The question in this case is not whether such a degree of care is owing to children. The question is not whether the plaintiffs feel that the defendants were exercising that degree of care at the time of the acident. The only question which arises is whether the jury might have found from the evidence that the defendants were exercising that degree of care. The jury having resolved that the defendants were exercising that degree of care, we must review the evidence in the light most favorable to that resolution, *Roche* v. *Zee*, 1 Utah (2d) 193, 264 Pac. (2d) 855.

The case of *Cotant* v. *United States* (U. S. District Court, D. Idaho E.), 103 Fed. Supp. 770, quoted extensively in plaintiffs' brief, differs substantially with the facts in the case at bar. In that case the driver of a United States mail truck, who was driving down a residential street, had a clear and unobstructed view of the whole area, including a number of children and the plaintiff child. After that accident the driver admitted that he was not

watching the children but was looking for another mail carrier in a different direction. In this case the defendant driver never had an opportunity to see the deceased child prior to the accident because his view was obstructed by five automobiles parked along the curb on the side of the road from whence she came in front of one of the automobiles. The defendant driver had seen the children playing ball on the unfenced grounds of the school on the opposite side of the road. The only criticism which can be leveled at him, if indeed we can criticize him, was that the defendant driver was directing a greater part of his attention to those children, which, as we view the situation from his point of view before the acident occurred, was the prudent thing to do. In fact, he was doing just the opposite of the driver in *Cotant* v. *United States*, supra. Having seen children playing on the north side of the road and anticipating one of them might come into the street in pursuit of a ball, he was doing just what the court in that case said he should do, and that is keep those children under his careful observation. By this we do not mean to imply that he directed all of his attention to that side of the road, because his testimony shows that he observed both sides of the road; otherwise he would not have been aware of the cars parked and the situation on the right side of the road as the evidence indicates he was.

The plaintiffs also assume that the deceased had crossed 18½ feet into the street at the time she was hit, which is not borne out by the record, at least as the jury may have viewed it. The child's body did apparently come to rest in the vicinity of the blood spot on the road, the center of which was 18½ feet from the south side of the road (R. 223) and directly out from the east side of the alley (Exhibits 8 and 11, R. 195, 197). However, the witness Gerald Christensen, who saw the child dart out into the street, states that she came from back of the principal's car and in front of the Hales car and that her body was "flipped", which indicates that she entered the highway at least a car length west of the west side of the alley and that her body was knocked or carried to the point at which it came to rest. David Weldon testified the child was knocked eight or fifteen steps. (R. 267).

In Section 1492, *Blashfield's Cyclopedia Of Automobile Law And Practice*, Volume 2A, the section following that set out in plaintiffs' brief, Blashfield, after discussing the rule set out in plaintiffs' brief, says:

> "However, the mere occurrence of a collision between a motor vehicle and a minor on the street does not of itself establish the driver's negligence. In order to sustain a charge of negligence against such a driver, some evidence justifying men of ordinary reason and fairness in saying that the driver could have

avoided the accident in the exercise of reasonable care must be shown.

> "In the absence of such a situation, until an automobile driver has notice of presence or likelihood of children near line of travel, the rule as to the degree of care to be exercised as to children is the same as it is with respect to adults, and an automobilist, not seeing or put on notice of children on or near the roadway, is not negligent in failing to decrease speed, particularly where he could not have avoided the accident had he decreased his speed."

Or to state it as the court has stated it in *Green* v. *Higbee*, 66 Utah 539, 244 Pac. 906

> "The test of defendant's liability is whether he exercised such care with respect to the speed and control of his automobile as an ordinarily prudent person would have exercised under similar circcmstances; the degree of care being greater when the safety of children is involved."

Following that rule, this court in ***Alvarado* v. *Tucker et al***, 2 Utah (2d) 16, 268 Pac. (2d) 986 sustained a judgment of the District Court dismissing the action where it appeared that an eleven year old girl was struck by an automobile in an area zoned for a speed of 25 miles per hour, there being a question in the case as to whether the defendant was exceeding the speed limit. This court said:

> "Even if the plaintiff were correct in her contention that the evidence would jus-

> tify a finding of 5 or 10 miles per hour in excess of the speed limit, she would still be faced with the necessity of proving that such excess of speed was the proximate cause of the injury. Under the facts here shown, that as defendant was proceeding southward, the plaintiff darted westward across the street and came out from behind the north bound car into defendant's course of travel. Nothing appears in the evidence, either directly or from reasonable inference, to indicate that he could have stopped in time to avoid striking plaintiff, even if he had been traveling only 25 miles per hour. In other words, from anything that appears, the fact of such excess speed would not have made the difference between hitting or avoiding plaintiff."

And again in the case of *Alvarez* v. *Paulus*, 8 Utah (2d) 283, 333 Pac. (2d) 633, an action brought for the death of the plaintiff's 22 month old daughter who was struck by a backing truck which was driven by the defendant, that being the only proof, this court held that the

> "Plaintiff had the burden of proving the negligence of Paul Paulus (the defendant) and that such negligence was the proximate cause of the accident."

The evidence in this case is that the defendant driver, Paul Caldwell, was proceeding along the street in front of the elementary school at a careful and cautious rate of speed, 15 to 20 miles per hour, and that he was mindful of the fact that he was passing in front of a school and was keeping a look-

out for children in the vicinity. The deceased child darted out into the street and into the side of the truck, being run over by the rear dual wheels. On the basis of this evidence the jury returned a verdict for the defendants. Plaintiffs in their brief have cited cases to the effect that a higher degree of care is owed to children, with which we concur. They would have us infer negligence from the mere happening of the accident and nothing more. To find that the court was required under such evidence to direct a verdict or to set aside the verdict or enter a judgment notwithstanding the verdict is tantamount to holding that a driver of a motor vehicle is the insurer of the safety of all children who enter upon a highway and liable for any injury which might come to said children without regard to the question of whether or not the driver is negligent and regardless of the circumstances. Such is not the law and it would have been error for the judge to so hold.

POINT II.

THE TRIAL COURT DID NOT ERR IN REFUSING THE PLAINTIFFS' EVIDENCE RELATING TO THE LENGTH OF TIME IT TOOK THE GIRLS OF THE SAME AGE AS DECEASED TO WALK OR RUN A DISTANCE OF 100 FEET.

The plaintiffs sought to solve this whole lawsuit for the jury by having the school principal, Roger E. Nielsen, a witness friendly to the plain-

tiffs, take the stand and testify as to certain tests which he had conducted, wherein he had seven girls first walk and then run 100 feet. They then proposed to have this witness testify as to the time that each of these girls took. Based upon this testimony and an assumption that the point of impact was 18 feet 5 inches from the south curb and an assumption that the truck was going 15 to 20 miles per hour, they then proposed to have a physicist speculate on how far the truck would have traveled during the time the child was going into the street and admittedly come up with conclusions as arrived at in their brief that the truck could have traveled anywhere from 17 feet to 73 feet. The speculative nature of this evidence is best illustrated by the variance in the conclusion at which the expert witness would have arrived.

Assuming this proffer of proof to have been otherwise admissible, it could have served no purpose in the case because there was no evidence upon which plaintiffs could have framed a hypothetical question to solicit the opinion of their expert. Plaintiffs assume that the point of impact was in the center of the blood spot found on the highway 18½ feet out from the edge of the road, but the Record does not bear them out. The only two eye witnesses to the accident were David Weldon, if indeed he was an eye witness, and Gerald Christensen. On direct

examination the witness David Weldon testified on at least two occasions that he had not seen the accident. On page 262 of the Record he was asked

"Q. Where did you see her?

"A. Well, the last time I seen her she was down by the swings."

On page 264 of the Record the court said

"THE COURT: Well, he just said, I believe, that the last time he saw her she was on the other side of the street on the swings.

"WITNESS: Yes."

On cross examination he was asked the question

"Q. Now when you were being asked by Mr. Eliason when you saw Nila, you said that the last time that you saw her was down by the swings?

"A. Yes.

"Q. Now was that the last time you saw Nila?

"A. Yes."

If, however, we accept his testimony, he testified relative to the point of impact as follows (R 267)

"Q. Did you hear anybody, did Nila say anything when she walked in the street?

"A. She said, 'Help, help,' when the car hit her at first.

* * * *

"Q. Now where was Nila when she said that?

"A. In the middle of the road.

* * * *

"A. It was going east.

"Q. It was going east, and then what did Nila do when she hollered, 'Help, help?'

"A. The truck hit her and knocked her.

"Q. And it knocked her?

"A. Yes.

"Q. And about how far did it knock her?

"A. Eight or fifteen steps."

So, according to his testimony, if we accept the same, Nila's body came to rest at the point where the blood spot was found 8 to 15 steps from where she was hit.

Gerald Christensen testified that the child darted out into the street from in back of the principal's car and in front of the Hales car and that her body was "flipped", which puts the point of impact at least the width of the alley and the length of the principal's car away from where the blood spot was found.

The assumption that the minor child in this case was walking was based on the testimony of David Weldon and it has already been illustrated how unreliable his testimony was. But whether we accept his testimony or not, it is apparent that the plaintiffs' proposed hypothetical question was improper because there is no evidence as to how far

the child walked or ran. The indications are that it was considerably less than the 18½ feet that the plaintiffs assume, and it would certainly have been improper for the court to permit testimony upon a hypothetical question which is not supported by the evidence in the Record.

Again it should be pointed out that the statements appearing on page 15 of the plaintiffs' brief as to what they proposed to prove are not contained within their proffer of proof to the District Court. The fact that there is no evidence in the Record to support the opinions which plaintiffs propose to show by their expert should dispose of this issue, but it would seem there are other objections to the proposed evidence. In the first instance the tests upon which the plaintiffs propose the hypothetical evidence and base their hypothetical questions and have their expert testify were made by a witness who, himself, was not an expert in the matters tested and by a witness admittedly prejudiced in behalf of the plaintiffs and hence their reliability is subject to serious question.

In a criminal case in Missouri, *State of Missouri* v. *Arthur Allison*, 51 S. W. (2d) 51, the State, over objection of defendant, introduced testimony of certain experiments made shortly before trial by witnesses who were not and did not claim to be experts for the purpose of demonstrating the effect, especi-

ally as to powder burns, of the near discharge of the gun with which a person was killed, using shells found in the house. It was urged that the admission of this evidence was prejudicially erroneous, with which the court agreed, saying:

> ". . . The general rule is that a nonexpert witness will not be permitted to testify to the results of experiments made out of court, but that a witness, who is an expert and has made experiments under conditions and circumstances as nearly similar as possible to those in the concrete case, may be permitted to state the result of his experiments made out of court . . . Evidence based on experiments, however, should be received with the greatest caution. The cautions to be observed are that, unless the experiments are shown to have been made under essentially the same conditions as in the concrete case, the tendency is to confuse and mislead rather than enlighten the jury."

The question of whether or not evidence of tests or experiments should be received is a matter largely within the discretion of the trial court. As said in 20 Am. Jur. 249:

> ". . . Evidence of the result of an actual experiment or test is admissible to aid in determining the issues in a case where it is shown that the conditions under which the experiment or test was made were the same or similar to the circumstances prevailing at the time of the occurrence involved in the controversy. Such evidence should, however, be admitted only where it is obvious to the

court from the nature of the experiments that the jury will be enlightened, rather than confused."

The movement of children is a generally observed phenomenon and would seem to be a matter within the common knowledge of the average juror. He may not be able to define this in specific children but all of us have, from time to time, observed children and are generally familiar with the speed at which they may walk or run or dart and their relative speed in regard to other objects. The proffered evidence would seem to be inadmissible upon the ground that it falls within the classification of those matters of which we all have common knowledge. As is said in 20 Am. Jur. 651:

> "Expert opinion testimony, while not limited or restricted in its scope to matters of science, art, or skill, is not allowed to invade the field of common knowledge. Such testimony cannot be received either to prove or to disprove those things which are supposed to lie within the common knowledge, experience, and education of men. It is inadmissible where the matter under consideration is of such a character that anyone of ordinary intelligence, without any peculiar habits or course of study, would be able to form a correct opinion. If the subject is one of common knowledge, as to which the facts can be intelligently described to the jury and understood by them and they can form a reasonable opinion for themselves, the opinion of an expert will be rejected. The mere fact that

> a witness may know more concerning the subject of inquiry and may better comprehend it than the jury does not qualify him as an expert whose opinion testimony may be given, unless the subject of inquiry relates to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence. Unless the subject of inquiry does relate to some trade, profession, science, or art, it is within the province of the jury to form their own opinion, and not of the witnesses, although experts, to express theirs. It is possible that the jurors may have less skill and experience than the witnesses and yet be able to draw their own conclusions. Expert testimony is not available for the purpose of giving a word of common meaning a technical significance."

Thus, in the case of *Alabama Great Southern Railroad Company* v. *Burnett Morgan Bishop* (Ala.), 265 Ala. 118, 89 So. (2d) 738, 64 A.L.R. (2d) 1190, in an action against the railway company for bodily injury sustained when a train struck a pedestrian at a crossing, the defendant's foot having been caught in a crevice, it was held error to allow an expert to testify as to the danger created by a crevice 2 inches wide and 6 inches deep. The court said:

> "The strict question with regard to this testimony is whether or not an average juror would be capable of forming a correct conclusion in respect to the safeness or unsafe-

ness for persons to walk over a crevice two inches wide and six inches deep in a populous railroad crossing. If this question is answered in the affirmative, the trial court was in error in allowing, over the defendant's objection, the expert to express the aforementioned opinions.

. . . . .

". . . We conclude that the subject here under examination, e.g., a crevice in a crossing (any more than a hole in the sidewalk or street) does not require expert opinion that it would be safe or unsafe for pedestrians for the reason that, given the physical facts, the ordinary mind is capable of forming a judgment thereon."

And in the case of *Sylvia Burton* v. *Horn & Hardart Baking Company* (Pa.), 371 Pa. 60, 88 A. (2d) 873, 63 A.L.R. (2d) 731, it was held not to be error, in an action against a restaurant proprietor for bodily injury sustained by a patron upon slipping on interior steps which were slightly wet due to a recent washing, to reject an offer by the plaintiff to prove by an expert witness that the steps were improperly constructed in that they did not contain an abrasive material or have a safety tread, and that terrazzo steps are slippery and dangerous when wet. The court said that this was a matter which was within the common knowledge of the jury.

Lastly, the proffered testimony would appear to be inadmissible in that it seeks to invade the pro-

vince of the jury and decide the ultimate issue on the case. As illustrated by page 15 of their brief, the plaintiffs proposed to show not simply how many feet a car traveling at a certain speed would travel in a certain period of time or how fast a child could walk or run, but they would have the physicist conclude that given a certain hypothesis the defendant driver should have seen the child in time to react and stop the truck prior to the actual impact and that he was, therefore, negligent, which is the very issue which the jury was impaneled to decide. A case in point is *Mary Wawryszyn* v. *Illinois Central Railroad Company* (Ill), 10 Ill. App. (2d) 394, 135 N. E. (2d) 154, 61 A.L.R. (2d) 801. That action was brought to recover for the death of a railroad employee as a result of a crated diesel motor falling off a dolly during a loading operation being performed by the employee and fellow employees. The witness was permitted to testify whether or not in his experience it was a good practice to load a motor of a certain type on a certain truck, and expressed the opinion that it was not. It was held error for the court to deny the defendant's objection, the court saying:

> "We believe it can be said to be the law of this state that neither an expert nor a non-expert witness may give his opinion on an ultimate issue in the case.
>
> . . . .
>
> "The purpose of the ultimate issue rule

is to preserve the independence of the jury. Its application should not be affected by technical, semantical distinctions. If the probabilities are that the jury will construe an expert's opinion that defendant's conduct or method was bad or improper to be the expert's opinion on the ultimate issue of negligence, then, according to the purpose of the rule, that opinion should not be allowed . . ."

The case of *Hooper* v. *General Motors Corporation* (Utah), 260 Pac. (2d) 549, cited in the foregoing case, is somewhat contrary to this rule. In that case an expert witness was allowed to testify as to what occurred to cause a separation of the spider and rim of the wheel of a truck, the court saying:

". . . opinions as to the cause of a particular occurrence or accident given by witnesses possessing peculiar skill or knowledge — that is, experts — are admissible where the subject matter is not one of common observation or knowledge, or in other words, where witnessess because of peculiar knowledge are competent to reach an intelligent conclusion and inexperienced persons are likely to prove incapable of forming a correct judgment without skilled assistance . . ."

It should be pointed out, however, that the testimony in the *Hooper* case, supra, went to a very technical matter upon which the jury would need very technical assistance. In this case the question is one upon which the jury, given all of the facts, can decide the issue.

In this respect we think that it should be kept in mind the purpose for which the evidence in this case was offered, and that is as a basis for the testimony of the plaintiffs' expert. For instance, testimony that a vehicle traveling 15 or 20 miles per hour will travel a certain number of feet per second, if material, would not be inadmissible since that information might have been helpful to the jury. The purpose of all of this evidence, the tests and experiments was merely to prepare the way for the hypothetical question which appears on page 303 of the Record to be asked of the physicist, to the effect that if we assume that the child's body was laying 18 feet 5 inches from the curb and that the truck was going at a certain speed, what his opinion would be. We believe that we have sufficiently illustrated that such a hypothetical question is improper in that there is no evidence in the record to support it, there being no evidence in the record as to the distance traveled by the child. To have permitted an expert to answer such a question would have been sheer speculation since his own estimate varies anywhere from 17 to 73 feet and he is in effect saying to the jury, take your choice. Moreover, the matters upon which plaintiffs' counsel would have the expert testify are matters which are within the common knowledge of the jury, are based on tests which are not reliable and invade

the province of the jury by substituting the expert's opinion for that of the jury upon matters where expert testimony is unnecessary.

POINT III.

THE COURT DID NOT ERR IN REFUSING PLAINTIFFS' REQUESTED INSTRUCTION NO. 14 TO THE EFFECT THAT NILA HALES EXERCISED ORDINARY AND REASONABLE CARE FOR HER OWN SAFETY.

The plaintiffs claim that the court erred in failing to give plaintiffs' requested Instruction No. 14 as follows:

> "You are instructed that based upon the commonly known fact that the instinct for self-preservation is such that persons use ordinary and reasonable care for their own safety. The law permits you to assume that Nila Hales, at the time of and immediately preceding the incident in question, was exercising due care for her own safety. And you may make findings in accordance therewith unless you are persuaded from a preponderance of the evidence that she was guilty of contributory negligence, as elsewhere in these instructions defined."

This contention is specifically answered in the case of *Yoshitaro Okuda* v. *Rose*, 5 Utah (2d) 39, 296 Pac. (2d) 287, which was also a death action. The court in that case said:

> "As to the first point on appeal, plaintiffs were not entitled to an instruction that the decedent was presumed to be acting with

due care for her own safety. The trial court instructed that the defendant had the burden of proving his affirmative assertion of contributory negligence by a preponderance of the evidence, and it has been indicated that there is no need to give an instruction to emphasize the burden of going forward with evidence where the defendant also has the burden of persuasion, as here. *Gibbs* v. *Blue Cab*, Utah, 249 P. 2d 213. In fact, it is said in *Mecham* v. *Allen*, 1 Utah 2d 79, 262 P. 2d 285, 291:

> "'. . . Thus defendant not only had the burden of going forward with the evidence but of persuading the jury on that issue. So in cases where the question of proving contributory negligence is involved this presumption can never be of any aid to the representatives of the deceased, because their opponent without the presumption has the burden of persuading the jury that he was guilty of such negligence which is a greater burden than and includes the burden of going forward with the evidence.'"

There is even less need for the instruction in this case than in the case of *Okuda* v. *Rose*, supra, for in this case there is evidence that the child darted out or walked out into the path of the truck. As was said by the court in *Okuda* v. *Rose*, supra,

> "There is no direct evidence in this case as to just what the decedent was doing at the time she was struck; the jury was required to make that determination from circumstantial evidence. They may have believed defendant's testimony that his car did not leave the trav-

eled portion of the highway, noted the evidence that Mrs. Okuda was dressed entirely in black, inferred that she was struck in the roadway and her body tossed by the impact to the shoulder. Therefore, by merely being in the path of automobiles on a heavily traveled, but poorly lighted street, they could conclude, she was guilty of contributory negligence regardless of whether she was attempting to cross the street or walking in an area reserved for vehicular traffic. Such inferences have always been held proper determinations for the jury to make."

POINT IV.

THE COURT DID NOT ERR IN THE INSTRUCTIONS GIVEN BY THE COURT ON NEGLIGENCE, PROXIMATE CAUSE, CONTRIBUTORY NEGLIGENCE AND UNAVOIDABLE ACCIDENT.

In Point IV of their brief the plaintiffs complain that the court instructed the jury twice on negligence, proximate cause and contributory negligence and cite as examples Instructions No. 8 and No. 13. In Instruction No. 8 the court defined "contributory negligence" and its legal effect and in Instruction No. 13 the court stated that the plaintiffs could not recover if negligence on the part of Nila Hales proximately contributed to her own injury and death. The court also gave Instruction No. 5 to the effect that it is the burden of the defendants to prove that Nila Hales was guilty of contributory negligence as alleged in defendants' Answer. Simply because a term is mentioned two or three

times in the instructions by the court outlining the issues to the jury does not in and of itself create a presumption that the instructions are prejudicial, provided the instructions are otherwise proper, and the fundamental inquiry resolves itself down as to whether or not it was proper for the court to instruct the jury in regard to these issues. I think there can be no question that instructions on negligence and proximate cause were proper and I shall confine my further discussions to the issue of contributory negligence and unavoidable accident.

In the case cited by the plaintiffs, *Bennett* v. *Deaton* (Idaho), 68 Pac. (2d) 895, an action was brought by the parents to recover for the death of their minor son. The evidence was that at or about the time of the collision the defendant Deaton was driving his automobile on the right side of a highway in a northerly direction at a speed of about 50 miles per hour. One Edsel H. Christensen was traveling with a team and wagon on the other side of the highway in a southerly direction. Several young boys from 8 to 13 years of age, among them the deceased for whom the action was brought, diagonally crossed a field from the west and arrived on or near the highway on the westerly side thereof at the point where the Christensen team and wagon was traveling. The boys then continued walking in a northerly direction, not in a body, but at scattered

intervals. At about the time of, or shortly after, the passage of the Deaton automobile and the wagon of Christensen, the deceased was struck by the automobile. No one, except Mrs. Deaton, saw the youth at the instant he was struck; some other witnesses saw him immediately before the impact and others immediately afterward. Mrs. Deaton testified that the boys were in back of the wagon and just at the instant the Deaton automobile passed the back of the wagon the deceased came with his back toward them, running onto the road, and was hit with the left fender of the defendant's car. The court concluded:

> "From the foregoing evidence it would appear that it might well be determined that the collision occurred in one of at least three ways. First, from the evidence of Christensen, it might be determined that deceased was struck on the easterly shoulder of the road; second, it might be determined that deceased was struck while crossing the highway from the easterly shoulder to the west side; and thirdly, that the deceased was struck in the manner as testified to by Mrs. Deaton; namely, that the deceased backed out running backwards diagonally across the highway and to the south, with his back to the car, as the Deaton automobile was going north and past the back end of the wagon. As to the first two possibilities above suggested there was evidence to support a finding by the jury of negligence on the part of appellant Deaton — the speed at which he was driving, the fact

that he did not see the boy or any of the boys, other boys being on the highway still further north and some being in the borrow pit on the side of the highway, until after striking the deceased with the left front of the car, the fact that the evidence disclosed no obstruction of vision which would have interferred with seeing the deceased and at least some of the other boys under such circumstances, and the fact that no warning, of the horn, or otherwise, was given. There is little if any evidence of contributory negligence on the part of the deceased with relation to these first two possibilities. As to the third possibility as disclosed by the record it may be conceded that the question of contributory negligence on the part of deceased was presented . . ."

In this case the most reasonable explanation of this accident which is supported by the record and the testimony of the witnesses is that the deceased, Nila Hales, "darted" out into the street from behind the principal's car and in front of her mother's car into the right hand side of the defendants' vehicle, apparently without looking or ascertaining that such a movement could be made in safety and at a point where it was her duty to surrender the right of way to the defendants' vehicle. Under the circumstances, if the jury should find that this did not measure up to that degree of care which ordinarily would be exercised by children of the same age, intelligence and experience (as instructed by

the court), then the deceased would be guilty of contributory negligence and it was surely proper for the court to submit this issue to the jury.

The instruction on "unavoidable accident" is in substance merely a consolidation of Instructions 16.6 and 16.1 from *Jury Instruction Forms for Utah*, not that this authority in and of itself establishes their correctness. Plaintiffs seem to imply that this instruction should be reserved to those instances where the accident might be due to weather conditions or an Act of God or an extreme emergency and suggest that the jury should consider the unavoidability of an accident as an issue or a ground of defense. However, it may be said that not to give the instruction is to suggest to the jury that proof of negligence is clear or that the circumstances of the accident tend to affirm negligence on someone's part or, in other words, the failure to give the instruction would suggest to the jury that they must find that the accident was caused by negligence on some person's part.

In the case of *Parker* v. *Womack*, 37 Cal. (2d) 116, 230 Pac. (2d) 823 (1951), a divided court held that there is a rare occasion when instructions on unavoidable accidents are not appropriate unless the defendant is negligent as a matter of law. The dissent in that case was based upon the contention that the instruction in question added nothing to

the usual instructions covering negligence and proximate cause and burden of proof and that, therefore, there appeared to be no reason to give it. The most apparent answer to this logic is that the jury should be made to understand that they need not necessarily find either party negligent.

An instruction which read

> "You are instructed that if you believe from the evidence that the injury to the plaintiff was the result of unavoidable accident and that the defendants' negligence was not the cause thereof, your verdict should be in favor of defendant, no cause of action"

was approved in the Utah case of *Nelson* v. *Lott*, 81 Utah 265, 17 Pac. (2d) 272.

The instruction has also been approved in the Arizona case of *Stuart* v. *Castro*, 76 Ariz. 147, 261 Pac. (2d) 371, where an animal suddenly darted in front of an automobile traveling at a reasonable rate of speed on a highway and was struck before the driver of the automobile could avoid the accident.

In *Anderson* v. *Bendily*, App. 66 So. (2d) 355 the Louisiana court approved the instruction under similar circumstances.

As was said in the Texas case of *Kuykendall* v. *Doose*, Tex. Civ. App., 260 S. W. (2d) 435

> "In determining whether issue of unavoidable accident is involved, facts of particular case must be examined to ascertain

whether there is presented a theory under which accident could have happened, notwithstanding all parties to transaction exercised degree of care required by law, and in so examining the facts evidence must be construed in light most favorable to submission of the issue."

Applying that test to the case at hand, the theory of the defense in this case was that the deceased child darted into the roadway and into the path of the defendants' truck at such a time and under such circumstances that the defendant driver was not guilty of negligence in failing to see her. The jury may well have so found from the evidence in this case. In view of the fact that the deceased was a child and not held to the same standard of conduct as an adult, the jury might also have found from the evidence that the child did not fail to exercise that degree of care required of a child of her age, experience and intelligence in darting or running into the street, which of course leads us to one conclusion — that the jury in this case might well have found that the defendant driver was not guilty of negligence in failing to see the child and the child was not guilty of negligence as a child in darting into the street and that the accident was, therefore, unavoidable. Under such circumstances it would seem that the giving of an instruction that they might so find was perfectly proper.

POINT V.

PLAINTIFFS RECEIVED A FAIR AND IMPARTIAL HEARING AND WERE NOT PREJUDICED BY ANY MISCONDUCT OF DEFENDANTS' COUNSEL OR INSTRUCTIONS WHICH WERE GIVEN OR WERE NOT GIVEN BY THE TRIAL COURT.

During his argument to the jury one of defense counsel did make the statement that the highway patrolman and investigating officers in the case had not issued any arrest or citation to the defendant driver. This was immediately objected to by plaintiffs' counsel, who, of course, gave his reasons for the objection. The Judge directed the defense counsel not to pursue the matter any further. No request was made for a direction to the jury to disregard this statement and, according to the recollection of the Judge who tried the case, none was given; nor was there any motion made for a mistrial by plaintiffs' counsel at that time or at the conclusion of the case before the verdict had been rendered by the jury. The matter was first raised in the plaintiffs' Motion For New Trial.

Since the statement was negative in character no harm would appear to have been done by the remark. For example, a statement to the effect that a witness heard a whistle blow, being positive in character, has a much greater impact than a statement by a witness that he did not hear a whistle blow since a whistle may have blown but the witness may not have heard it. The same would be true

of a statement to the effect that the defendant driver did not receive a citation. This would not be construed by a jury to mean that he was, therefore, not guilty of any negligence, or at least not to the extent that a statement that he had received a citation would be construed by a jury to mean that he was guilty of negligence. At any rate, the objection of plaintiffs' counsel and the direction from the Judge not to pursue the matter further would correct any harm that may have been done by the statement.

As is said in 53 Am. Jur. 407:

> "Since in many cases the effect of improper argument can be removed by an instruction to the jury to disregard it, the courts generally require, in order to predicate error thereon, that an objection be made at the time of the improper statement, so that an opportunity may be given the attorney making the misstatement and the court to rectify the damage. Dependent upon the circumstances of the particular case, sometimes the mere sustaining of an objection to the improper remark, or the sustaining of an objection, together with an admonition to counsel, will be sufficient to remove the injurious effect thereof.
>
> "In many cases the effect of an improper remark in the opening statement or the closing argument may be cured, upon objection of opposing counsel, by its prompt withdrawal by the offending counsel, and when so withdrawn, in the absence of prejudice, such a re-

> mark is not ground for reversal. Thus, the withdrawal by a prosecuting attorney of a remark made by him which was objected to as a comment on the failure of the defendant to testify has been held in several cases to cure the error complained of. Likewise, the withdrawal and retraction by counsel of an improper appeal to racial, religious, social, or political prejudice, made by him in his argument to the jury, is sometimes sufficient to remove the injurious effect of such argument, particularly where accompanied by an admonition of counsel by the court or a direction by the court for the jury to disregard the remark. However, in some cases the mere withdrawal by counsel of an improper appeal to social prejudice has been held insufficent to remove the injurious effect thereof."

The plaintiffs complain of the failure of the trial court to give plaintiffs' proposed Instructions 8, 9 and 10 and cite in support thereof the California case of *Lampton* v. *Davis Standard Bread Company*, 191 Pac. (2d) 710, *Conroy* v. *Perez*, 148 Pac. (2d) 680 and *Frederickson* v. *Costner*, 221 Pac. (2d) 1008 to the effect that a person operating a vehicle near a school ground has a higher degree of care to avoid children than might be the case under other circumstances, with which we agree. However, the court covered this standard of duty in its Instruction No. 6 which was as follows:

> "You are further instructed that inasmuch as this accident and the ensuing death occurred immediately in front of an elemen-

> tary school house, at an hour just before school took up and when students were crossing the street in coming to school and were also playing adjacent to the street and that the defendant, driver, well knew of the presence of small children using the street, he is required to use such care and caution as the circumstances demanded and to operate a loaded gravel truck past the school under such circumstances employing careful and alert observation of the danger lying or apparent in defendant's path."

This, coupled with Instruction No. 9 to the effect that a driver of a car on a public highway has a duty to use reasonable care to keep a lookout for other vehicles and other conditions reasonably to be anticipated and to keep his car under reasonably safe and proper control and to drive at such a speed as is safe, reasonable and prudent under the circumstances, having due regard to the width, surface and condition of the highway, the traffic thereon, the visibility and any potential hazards then existing, and the last part of Instruction No. 10 would appear to be addressed to the same point. That instruction provides in part:

> ". . . The driver's duty requires him to be vigilant at all times, keeping a lookout for traffic and other conditions reasonably to be anticipated, and to keep the vehicle under such control that, to avoid a collision with any person or with any other object, he can stop as quickly as might be required of him by conditions that would be anticipated by an ordinary, prudent driver in like position."

There is some question as to whether or not an instruction to the effect that a driver may be responsible for injury or death to a child, even though he did not see the child in time to prevent the injury, is proper in that it seems to comment upon the evidence. However, whether it is proper or not, the mere submission of this case to the jury with the instruction that they might return a verdict in favor of the child even though the evidence indicates that the driver claims he did not see the child would seem to be as clear an instruction as could be made that the jury could return a verdict in favor of the child even though the defendant driver claims he did not see the child. Otherwise, the court would not have submitted the case to the jury and the jury could not but have understood that they might find the defendants liable to the plaintiffs under the circumstances even though the defendant driver claimed he did not see the child.

CONCLUSION

The fundamental inquiry involved in this appeal reduces itself to two questions:

1. Did the plaintiffs receive a fair and impartial hearing?

2. If the plaintiffs did receive a fair and impartial hearing, might the jury reasonably find from the evidence that the defendants were not li-

able to the plaintiffs for the death of the plaintiffs' minor daughter or, to state the question in another way, did the evidence so preponderate in the plaintiffs' favor that the jury could not, as reasonable men, resolve the issues other than in the plaintiffs' favor?

There is no question but that a minor child is held in a favored status by reason of his tender age, and the jury was so instructed in Instruction No. 12 which provided as follows:

> "A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily would be exercised by children of the same age, intelligence and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for her actions by the same standard as applies to an adult. It is for you to determine if the conduct of Nila Hales was or was not such as might reasonably have been expected from a child of the same age, intelligence and experience, under the same or similar circumstances."

Nor is there any question that a driver, once he becomes aware of children, owes a greater duty to children than would be in the case of an adult, and again the jury was so instructed. It was in this vein that the case was tried and it was with this idea before the jury that they deliberated and returned a verdict for the defendants.

Plaintiffs claim that they were prejudiced by a remark of the defense counsel in his closing argument to the effect that the defendant driver had not received a citation. It is doubtful that such a statement had any effect on the jury, and whatever effect it may have had was corrected by the plaintiffs' objection and the admonition of the court to defense counsel.

Plaintiffs further claim that they were prejudiced by the refusal of the court to admit the proffered evidence of their physicist who, based on certain unrealiable tests by a witness partial to the plaintiffs, would have offered his opinion, making various assumptions, as to the distance traveled by the truck and the child during corresponding periods of time. That such evidence would have been sheer speculation and not at all helpful to the jury is best illustrated by the various conclusions which the expert would have testified to, that is that the truck could have traveled anywhere from 17 feet to 73 feet during the time the child was coming into the street, granting certain hypothesis. More fundamental, however, is the fact that there is no evidence in this case on which to base any hypothetical questions to an expert witness, there being no evidence of where the child was hit and, therefore, being no basis for any comparative analysis between the distances traveled by the truck and

the child. Moreover, such evidence as there is upon which plaintiffs proposed to base their hypothetical questions comes from the mouth of a witness who on several occasions on direct examination admitted that he did not see the accident.

Viewing this evidence in the light most favorable to the defendants, as we must do at this point, the jury, as reasonable men, could well have found that the defendant driver, even though he was aware of the fact that he was passing a school ground was driving at a reasonable speed of 15 to 20 miles per hour and that the child darted out from behind parked cars into the side of the defendants' vehicle when said vehicle had reached such a point that the defendant driver in the exercise of reasonable care was not negligent in failing to see her and stop his vehicle. They could well have found, and apparently did, that her movements prior to coming out into the street were obscured by the automobiles parked along the south side of the road and that the defendant driver was not negligent in failing to notice her prior to the time she darted out into the street. And they might further have found that the deceased, Nila Hales, was not exercising that degree of care which might reasonably be expected of a child nine years of age when she apparently darted out into the street and into the side of the approaching truck without first ascertaining

that such movement could be made in safety.

We submit that the plaintiffs received a fair and impartial hearing of their case in the District Court, that any error which was committed by the District Court was not prejudicial and that the verdict of the jury was supported by the evidence in the case. To hold otherwise would be to say that the defendants were guilty of negligence merely by reason of the fact that the accident occurred and the deceased was a child nine years of age. It is, therefore, our conclusion that the judgment of the District Court should be affirmed and the appeal dismissed.

Respectfully submitted,

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